A

LEMBAMAN DEVELOPMENT SDN BHD v. OOI LAI YIN & ANOR AND OTHER CASES

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEWS NO: 25-57-05-2014, 25-59-05-2014 & 25-67-05-2014]
10 APRIL 2015

B

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash award of Tribunal of Homebuyers (Tribunal) – Whether Tribunal erred in calculation of damages for vacant possession with reference to booking date – Whether Tribunal erred in adopting purchase price as base price even though rebates were given – Whether liquidated and ascertained damages available for delayed completion of common facilities when both parcel and facilities were within same building – Whether Tribunal erred in holding applicant responsible and liable for delay in completion of both parcels and common facilities – Whether there was any issue of double claim*

C

D

The applicant, a developer of a housing project had applied by way of a judicial review for an order of certiorari to quash the decision of the Tribunal of Homebuyers ('Tribunal'), in respect of three cases. The respondents were the purchasers of property from the applicant and also the Homebuyers Tribunal. The grounds for this application were essentially threefold *ie* that the Tribunal had erred in (i) the commencement date used in computing the period of delay in handing over vacant possession for the purposes of calculating the liquidated and ascertained damages ('LAD'); (ii) the adoption of the purchase price as the base price for the award even though rebates were given; and (iii) holding the applicant responsible and liable for delay in completion of both parcels and the common facilities which led to the issue of double claim. In respect to the first ground, the applicant contended that the computation of 36 calendar months by virtue of cl. 25(1) of the Sales and Purchase Agreement ('SPA'), should be the date of the SPA and not the date of the first booking as adopted by the Tribunal. The reason put forth was because there could not be a concluded contract on the first booking date because the amount paid only amounted to 1% of the purchase price and should there be a failure to pay the balance 10% and to sign the SPA within 14 days, there would be no sale concluded. In the alternative, the applicants argued that since the SPA was dated 15 December 2010, the computation of 36 months ought to be calculated from 16 December 2013 to 14 January 2014, *ie*, 29 days delay instead of 316 days as computed by the Tribunal. In support for the second ground, the applicant argued that the figure used by the Tribunal was the sale price in the SPA *ie*, RM389,900 whereas the actual purchase price was RM369,900. The Tribunal did not take into account the rebate of RM20,000 given by the applicant. Therefore, the use of the figure of RM389,900 as reflected in the SPA was thus unfair to the applicant. For

E

F

G

H

I

the third ground, the applicant submitted that the parcel and the common facilities were within the very same building and that the purchase price paid under the agreement was for both the parcel and common facilities and not separately. As such, if the completion of the parcel was delayed, naturally the completion of common facilities would also be delayed. The applicant contended that the LAD under cl. 27(2) of SPA for delayed completion of common facilities was not available when the developer was already late for the building where both the parcel and facilities were within it as otherwise the legislature would simply prescribe a penalty of 12 % instead of 10% as prescribed under cl. 25(2) and 2% under cl. 27(2). The applicant further argued that to award the respondent's with damages of 2% was not a genuine pre estimation of damages and contradicted s. 75 of the Contracts Act 1950 ('CA 1950').

Held (dismissing applicant's applications with costs):

(1) The relevant date was the date when the booking fee was paid. If the position was otherwise, developers could arbitrarily fix any date to have the SPA executed to the prejudice of the purchasers. Therefore, once the booking fee was paid, a contract comes into existence and parties assume obligations at that juncture, a breach of which would result in certain consequences befalling the guilty party. The Tribunal therefore had not erred when it decided to ascertain the date for calculation of damages for vacant possession with reference to the booking date. (para 10)

(2) The SPA clearly stated that 10% of the purchase price was RM38,990. Deducting the booking fee of RM3,000 paid by the respondent's gave a balance of RM35,990. When the applicant collected the sum of RM15,990 from the respondent's the amount of the rebate *ie*, RM20,000 for payment of the balance purchase price was deemed as collected. Therefore, the rebate only affected the balance 10% of the purchase price and had no impact on the purchase price itself which remained at RM389,900. Further, the monthly instalments required to be paid by the respondent's would not deviate from the figure stated as the purchase price in the SPA. Therefore the decision of the Tribunal in using the sum of RM389,900 as the base figure to compute the award was not erroneous. (para 14)

(3) A perusal of cl. 25 and cl. 27 of the SPA indicated that the parcel and the common facilities relate to entirely different things and the prescribed penalties for non-compliance were different. Being a statutory form of contract, it was reasonable to also conclude that the intention of the legislature was to treat the two clauses as distinct. An examination of the Certificate of Completion and Compliance ('CCC') also revealed that the description of the parcel and the common facilities were treated as distinct from each other. Therefore, there was no case of overlapping between the liquidated damages prescribed for late delivery of the 'parcel' and that of the 'common facilities'. (para 19)

(4) While parties in normal contractual cases had the freedom to make provisions between themselves, such freedom was not accorded to a housing developer and so parties to a contract under Schedule H could not contract out of the prescribed Schedule. Therefore, where the statutory form of contract prescribed for the provision of liquidated damages both in respect of the delay in the delivery of the 'parcel' and the 'common facilities', the developer was not at liberty to contend that the damages for the delay in the delivery of the 'common facilities' was contingent upon the delivery of the 'parcel'. (paras 20 & 21)

(5) The provision of damages for the delay in the completion of the 'common facilities' was something known to the parties when the contract was made and therefore the ensuing damages were not too remote. The damages thus awarded for the delay in the completion of the 'common facilities' were in accordance with the provision of ss. 74 and 75 of the CA 1950. Therefore, the Tribunal's award was not flawed and there was no error of law in the award made. (paras 27 & 28)

Case(s) referred to:

Hadley v. Baxendale (1854) 9 Exch 341; [1843-60] All ER Rep 461 ***(refd)***
Lim Eh Fah & Ors v. Seri Maju Padu [2002] 4 CLJ 37 HC ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 74, 75
Housing Development (Control And Licensing) Regulations 1989, reg 11(1), Sch H

For the applicant - Quah Boon Nee; M/s JB Lim & Assocs
For the respondents - Lai Mei Fong; M/s Murad & Foo

Reported by Sandra Gabriel

JUDGMENT

Collin Lawrence Sequerah JC:

The Applications

[1] This case upon the agreement of parties was heard together with case No. 25-59-05-2014 and case No. 25-67-05-2014 as most of the issues involved are common. They are all applications by way of judicial review by a common applicant for *certiorari* to quash the decision of the Tribunal of Homebuyers (tribunal), given on 22 April 2014 in respect of case No. 25-59-05-2014 and 7 May 2014 in respect of case No. 25-57-05-2014 and case No. 25-67-05-2014 respectively. The applicant in all three applications is the developer of a housing project while the first and second respondents in case No. 25-59-05-2014 and 25-67-05-2014 and the first respondent in 25-57-05-2014 respectively are purchasers of properties from the applicant. The second respondent in case No. 25-57-05-2014 and the third respondent in cases No. 25-59-05-2014 and 25-67-05-2014 is the tribunal.

[2] In respect of all of the cases, the type of sale and purchase agreement used was the statutory contract pursuant to the Housing Development (Control And Licensing) Act 1966 and Schedule H of the Housing Development (Control And Licensing) Regulations 1989 and sub-reg. 11(1).

Chronology Of Events

[3] In order to facilitate an understanding of these applications and the issues involved, it is pertinent to list a chronology of events as follows:

(For case No. 25-57-05-2014)

Dates	Events
16 May 2010	Housebuyers paid RM3,000 and deposit for car park.
12 June 2010	Housebuyers paid a further RM15,590.
5 October 2010	Developer issued credit note for RM20,000.
3 January 2011	Sales and purchase agreement (SPA) dated by purchasers solicitors.
31 December 2013	Completion notice issued by developer to housebuyer.
14 January 2014	Deemed delivery of vacant possession.
7 May 2014	Award made by tribunal (third respondent): RM22,942.55 for late delivery and RM6,452.04 for late completion of common facilities. (Total: RM27,235.03).

(For case No. 25-59-05-2014)

Dates	Events
17 February 2010	House buyers paid RM3,000 and deposit for car park.
5 March 2010	House buyers paid RM15,990.
5 October 2010	Developer issued credit note for rebates of RM20,000.
15 December 2010	SPA dated by purchasers solicitors
31 December 2013	Completion notice issued by developer to house buyers.
14 January 2014	Deemed delivery of vacant possession.
22 April 2014	Award made by tribunal (third respondent): RM33,755.73 for late delivery and RM6,452.04 for late completion of common facilities. (Total: RM40,207.77).

(For case No. 25-67-05-2014)

Dates	Events
3 January 2010	House buyers paid RM3,000 and deposit for car park.
10 March 2010	House buyers paid the balance deposit of RM20,790.
3 January 2011	SPA dated by purchasers solicitors.
31 December 2013	Completion notice issued by developer to house buyers.
9 March 2013	Deemed delivery of vacant possession.
7 May 2014	Award made by tribunal (third respondent): RM20,270.38 for late delivery and RM3,871.58 for late completion of common facilities. (Total: RM24,141.96).

Grounds Of Application

[4] The grounds for these applications are essentially threefold and as follows:

(a) The tribunal erred in the commencement date used in computing the period of delay in handing over vacant possession;

(b) The tribunal erred in the adoption of the purchase price as the base price for the award even though rebates were given; and

(c) The tribunal erred in holding the applicant responsible and liable for delay in completion of both the parcel and the common facilities.

[5] Each of these will be considered in turn. The references to the chronology of events, time frames and documents including enclosure numbers referred to in the course of this judgment all relate to case No. 25-59-05-2014 only. The findings of this court, however, are the same and binds all the cases, save for issue (b) in respect of the rebates which does not apply to case No. 25-67-05-2014.

The Tribunal Erred In The Commencement Date Used In Computing The Period Of Delay In Handing Over Vacant Possession

[6] In respect of issue (a), cl. 25(1) of the sales and purchase agreement (SPA) states that vacant possession of the parcel shall be delivered to the purchaser within 36 calendar months from the date of the SPA. It is the applicant's contention that the proper date of commencement of calculation of the delay in handing over vacant possession should be the date of the SPA and not the date of the first booking adopted by the tribunal ie, 17 February

2010. The reason for their contention is that there cannot be a concluded contract on that date (first booking date) because the amount paid only amounts to 1% of the purchase price and should there be a failure to pay the balance 10% and to sign the SPA within 14 days, there would be no sale concluded. They contend therefore that a contract only comes into existence upon payment of 10% of the purchase price, which in this particular case was contended to be on 5 October 2010 where the applicant granted rebates and issued the credit note upon which the 10% was deemed settled. Alternatively, since the SPA is dated 15 December 2010, the promised date for delivery of vacant possession is 36 months thereafter, that is on 15 December 2013, henceforth, the delay in delivery of vacant possession ought to be calculated from 16 December 2013 to 14 January 2014, ie, 29 days delay instead of 316 days as computed by the tribunal.

[7] The respondent's contention on the other hand, is that all established legal authorities state that the date for purposes of calculation of damages for late delivery of vacant possession is not from the date of the settlement of the 10% deposit or SPA but from the date of payment of first deposit. In further support of their contention, they referred to a receipt dated 17 February 2010 for the sum of RM3,000 issued in respect of payment of partial 10% of Item 1, exhibited at p. 85 of encl. 8 in case No. 25-59-05-2014. Item 1 is the purchase price as stated in the Third Schedule of the SPA. Reference was also made to a document exhibited at p. 46 of encl. 2 in case No. 25-59-05-2014 which is a receipt issued by the applicant containing, *inter alia*, under the remarks column a rebate of the sum of RM20,000 and containing a sales date of 17 February 2010. A letter of offer contained in the same exhibit at p. 47 until p. 49 revealed the date as being 17 February 2010 which is the same date as that of the payment of the booking fee ie, 17 February 2010. In fact p. 47, which is the applicant's own document, contains the wordings "I/We have agreed to purchase the above captioned property from the above named vendor ...". These documents, submit the respondent, evince a clear intention on the part of the applicant to be bound contractually to the respondents with reference to the date when the booking fee ie, 17 February 2010, was paid.

Finding Of The Court In Respect Of Issue (a)

[8] The clear issue that lends itself for determination here is which date is to be taken as the date for computation of delay in delivery of vacant possession for the purposes of calculating the liquidated and ascertained damages (LAD). The authority relied upon by the tribunal in coming to its decision was the case of *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37 where on the facts a sum equivalent to 10% deposit was paid upon booking. The short issue was whether to adopt the booking dates or the sale agreement date of deed of assignment as contended by the developer. The court held that the booking date was to be adopted as that was the date when the contract was struck. In so holding the court reasoned as follows:

A One must bear in mind that the date of 17 July 1992 ie, the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, *the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which would certainly prejudice the interest of the purchaser*. (emphasis added)

[9] The court also said as follows:

To support my findings, I seek solace from the case of *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797, which factually was on all fours with the current case. There a purchaser had bought a unit of property from the developer (appellant). A deposit was paid on 17 February 1984 with the agreement being signed on 27 June 1984. The developer failed to deliver the impugned property within the agreed thirty-six months, whereupon the buyer claimed liquidated damages. Following an earlier case of *Hoo See Sen & Anor v. Public Bank Bhd* [1988] 2 MLJ 170, the Supreme Court had decided that the relevant date for ascertaining when time started to run to be when the booking fee was paid. Under held it is clearly authored:

> For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of signing of the sale and purchase agreement.

[10] The finding of this court therefore, that based on the aforesaid authority, the relevant date is the date when the booking fee was paid. The *Lim Eh Fah* case clearly stipulated that where the position otherwise, developers could arbitrarily fix any date to have the SPA executed to the prejudice of the purchasers. If this were to be the case, then developers would obviously choose a date later in time with the intention of potentially having to bear less damages for late delivery of vacant possession. Therefore, once the booking fee is paid, a contract comes into existence and parties assume obligations at that juncture, a breach of which would result in certain consequences befalling the guilty party. The tribunal therefore had not erred when it decided on good authority and in the absence of any authorities to the contrary, to ascertain the date for calculation of damages for vacant possession with reference to the booking date.

The Tribunal Erred In The Adoption Of The Purchase Price As The Base Price For The Award Even Though Rebates Were Given

[11] In respect of issue (b), the contention of the applicant is that the base figure used by the tribunal to compute the award is erroneous as it did not take into account the rebate of RM20,000 given by the applicant. The figure used by the tribunal was the sale price in the SPA ie, RM389,900 whereas the actual purchase price is RM369,900. The use of the figure of RM389,900 as reflected in the SPA is thus unfair to the applicant. In case No. 25-67-05-

2014, the rebate is not an issue as no rebate was given there. Therefore, the issue under discussion here only concerns cases No. 25-57-05-2014 and 25-59-05-2014.

[12] The respondents in reply submitted that the rebate affects only payment of the deposit which was deemed collected and not the monthly instalments to be paid by the respondents and therefore, there is in fact no element of discount. Hence, the tribunal adopted the correct figure ie, the sum of RM389,900 as reflected in the SPA in the computation of the award.

[13] In support of their submission, the respondents directed the attention of the court to p. 86 of encl. 8 in case 25-59-05-2014 which is the official receipt No. 10207/DEP dated 5 March 2010 for the payment of "BALANCE 10% of ITEM 1". The court was then cross-referred to p. 49 of the same enclosure which is ITEM 1 of the Third Schedule of the SPA which indicates the schedule of payment of purchase price and records the sum of RM38,990 as being the sum immediately payable upon the signing of the SPA ie, 10% of the purchase price. The rebate is not captured in these documents. The rebate of RM20,000 was therefore deemed collected upon the applicant issuing their official receipt No. 10207/DEP for payment of the balance 10% of the purchase price.

Finding Of The Court In Respect Of Issue (b)

[14] The Third Schedule of the SPA clearly states that 10% of Item 1 which is the purchase price is RM38,990. Accordingly, the purchase price would then be RM389,990 which is reflected in s. 5 of the Sixth Schedule of the SPA. Deducting the booking fee of RM3,000 paid by the respondents on 17 February 2010 gives a balance of RM35,990 ie, RM38,990 minus RM3,000 equals to RM35,990. So, when the applicant collected the sum of RM15,990 from the respondents and issued the official receipt No. 10207/DEP dated 5 March 2010, the amount of the rebate ie, RM20,000 for payment of the balance purchase price was deemed as collected ie, RM35,990 minus RM20,000 equals to RM15,990. This fact was also admitted by the applicant's witness during the hearing before the tribunal at p. 23 of encl. 11. Therefore, the rebate only affected the balance 10% of the purchase price and had no impact on the purchase price itself which remained at RM389,900. Further, the monthly instalments required to be paid by the respondents would not deviate from the figure stated as the purchase price in the SPA. The finding of this court therefore is that the decision of the tribunal in using the sum of RM389,900 as the base figure to compute the award was not erroneous.

The Tribunal Erred In Holding The Applicant Responsible And Liable For Delay In Completion Of Both The Parcel And The Common Facilities

[15] Issue (c) concerned the issue of a double claim for the same default allegedly imposed upon the applicant by the decision of the tribunal. While cl. 25(2) of the SPA imposes charges for delay in delivery of the parcel,

cl. 27(2) stipulates that the developer shall pay 2% (10% 0f 20%) of the purchase price for the late completion of the common facilities.

[16] The applicant's contention is that the parcel and the common facilities are within the very same building and the purchase price paid under the agreement is for both the parcel and common facilities and not separately. Therefore, if the completion of the parcel was delayed, naturally the completion of common facilities will also be delayed as both are part of the same building and cannot be completely separated. To enable the purchasers to claim both compensation for the same delay could not be the effect of the agreement for otherwise Parliament would have imposed a 12% p.a. penalty (in the statutory contract) for delay in delivery of parcel alone (for there will never be a case where the common facilities are completed earlier than the parcel). They further submit that the compensation for delayed completion of common facilities in cl. 27(2) should only apply to a situation where the parcel is completed earlier than the common facilities (ie, swimming pool and other infrastructures on different part of the building) for then the purchaser would be denied the benefits of the common facilities. It was also submitted that the purchase price for the parcel includes that of the common facilities and the schedule of payment refers to completion of both before the payment of completion price. There were no separate payment schedule for stages of completion for common facilities. Therefore, a delay in completion of the building inevitably involves both parcel and common facilities within it.

[17] They submit that the LAD under cl. 27(2) of SPA for delayed completion of common facilities is not available when the developer is already late for the building where both the parcel and facilities are within it as otherwise the legislature would simply prescribe a penalty of 12% instead of 10% as prescribed under cl. 25(2) and 2% under cl. 27(2). Therefore, the compensation under cl. 27(2) is only available in a situation when after the delivery of parcel, the developer still failed to deliver the common facilities (ie, pool, guard house etc). The logic of this, they submit, is that the purchaser would have failed to enjoy the promised facilities and therefore suffered losses. They say that no house buyers will be or are capable of having suffered any loss at all for the delay in completion of common facilities if the house buyers are in no position to move in and use the parcel with the common facilities any way. The house buyer cannot claim for loss of enjoyment of the facilities if he has not moved in or has not put up the parcel for rental. To award the respondents with damages of 2% is certainly not a genuine pre-estimation of damages and contradicts s. 75 of Contracts Act 1950 and the principle in the Federal Court case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817. A logical reading of the two penalty clauses ought to be read as to allow cl. 27(2) only when the common facilities was completed later than the delivery of the parcel.

[18] The respondents on the other hand submitted that the two types or head of damages are different things altogether. They directed the attention of the court to the terms of the SPA at pp. 39 and 40 respectively which refer to cl. 25 and cl. 27. Clause 25 refers to the time for delivery of vacant possession of the parcel and stipulates payment of liquidated damages at the rate of 10% per annum on a daily basis of the purchase price whereas cl. 27 stipulates liquidated damages at the rate of 10% per annum calculated on a daily basis of the last 20% of the purchase price for completion of the common facilities. The method and nature of the computation is different because they refer to different things. To fortify their argument, the respondents directed reference to the interpretation section in cl. 35(g) of the SPA at p. 42 of encl. 8 where "parcel" means parcel as defined under the Strata Titles Act 1985 which in turn defines parcel as "in relation to a subdivided building, means one of the individual units comprised therein, which (except in the case of an accessory parcel) is held under separate strata title, and in relation to a subdivided land, means one of the individual units of land parcel". A reference to the Second Schedule to the SPA lists and describes "Common Facilities and Services" as encompassing swimming pool and children's pool, gymnasium, landscaped gardens, BBQ pit and multi-purpose hall. This, argue the respondents, show that the description of common facilities has got nothing to do with the parcel and therefore there is no overlapping between the two. They are thus two very different and separate type of damages. They also referred to the Court of Appeal decision of *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852 where it was held, *inter alia*, that the respondents in the case were not under a duty to prove the damages that they have suffered because cl. 22(2) of the statutory contract provides that the damages are liquidated and calculated in accordance with the formula prescribed by the clause and that no further onus lay upon the respondents. Similarly, since there is a prescribed formula here, the respondents are entitled to the liquidated damages according to the formula prescribed without having to prove their losses for both heads of damages as they have been separately categorised.

Finding Of The Court In Respect Of Issue (c)

[19] A perusal of cl. 25 and cl. 27 of the SPA indicates that that they relate to entirely different things. If it were otherwise, they would be no necessity to include them in two different clauses. Indeed, if one were to examine the wordings of these clauses, one would find that they describe two very different things and the prescribed penalties for non-compliance are different. Further, a comparison between the interpretation section in cl. 35(g) of the SPA and Second Schedule to the SPA show that "parcel" and "common facilities and services" respectively are described differently. Being a statutory form of contract, it is reasonable to also conclude that the intention of the legislature was to treat the two clauses as distinct. An examination of the certificate of completion and compliance (CCC) at p. 89 of encl. 8 also

reveals very clearly that the description of the parcel and the common facilities are treated as distinct from each other. Therefore, the decision of this court is that there is no case of overlapping between the liquidated damages prescribed for late delivery of the "parcel" and that of the "common facilities".

[20] With respect to the contention that the respondents have suffered no loss in respect of the late delivery of the "common facilities" because the "parcel" had yet to be delivered, the short answer can be found in the *Sentul Raya* case (*supra*) itself where it was held that contracts such as the one under consideration are categorised as special contracts as it is prescribed and regulated by statute. So while parties in normal contractual cases have the freedom to make provisions between themselves, such freedom is not accorded to a housing developer and so parties to a contract under Schedule H cannot contract out of the prescribed Schedule. To make the position clear, the relevant passage from the case of *Sentul Raya* is reproduced as follows:

> The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract.

[21] Therefore, where the statutory form of contract prescribes for the provision of liquidated damages both in respect of the delay in the delivery of the "parcel" and the "common facilities", the developer is not at liberty to contend that the damages for the delay in the delivery of the "common facilities" is contingent upon the delivery of the "parcel". With regard to the applicant's contention that awarding of damages for the late delivery of the "common facilities" in addition to the "parcel" would contradict s. 75 of the Contracts Act 1950 and the principle in *Selva Kumar Murugiah*'s case (*supra*), an examination of that decision by the Federal Court will reveal that it was held that a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1854] 9 Exch 341; [1843-60] All ER Rep 461.

[22] Now, the principles enunciated in the case of *Hadley v. Baxendale* are these:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, *or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*. (emphasis added)

[23] The second limb of *Hadley v. Baxendale*, in the considered opinion of this court, provides sufficient basis for the recovery of the liquidated damages for delay in the delivery of the "common facilities" in the prescribed statutory contract.

[24] Such damages resulting as a result of any such breach would certainly have been within the contemplation and knowledge of both the applicant and the respondents at the time the contract was made and this is even more so where in a case such as this, the statutory form of contract was used by parties.

[25] This conclusion further leads to another relevant point and that is, such damages were in all the circumstances of the case, not too remote. Indeed the common law principle in *Hadley v. Baxendale* is embodied in s. 74 of the Contracts Act 1950 which reads as follows:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, *or which the parties knew, when they made the contract, to be likely to result from the breach of it*. (emphasis added)

[27] The provision of damages for the delay in the completion of the "common facilities" was something known to the parties when the contract was made and therefore the ensuing damages were not too remote. The damages thus awarded for the delay in the completion of the "common facilities" were in accordance with the provision of ss. 74 and 75 of the Contracts Act 1950.

[28] In the premises, there is no contradiction with the operation of s. 75 of the Contracts Act 1950 (this being a special form of statutory contract) and the principles espoused in the case of *Selva Kumar Murugiah*'s case (*supra*). In any event, this court is of the view that the damages stipulated for delay in the delivery of the "common facilities" are reasonable within the contemplation of s. 75 of the Contracts Act 1950. The finding of this court is therefore that the tribunal's award was not flawed and there is no error of law in the award made. In the upshot, the applications of the applicant are hereby dismissed with costs.